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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association, with the consent of the parties, submits this brief *amicus curiae* in support of petitioners.

INTEREST OF THE AMERICAN BAR ASSOCIATION

This case presents two issues of peculiar significance to lawyers: (1) the scope of the attorney-client privilege as applied to communications made to a lawyer by employees of a corporate client; and (2) the extent

to which a lawyer's work product is subject to administrative discovery. Issues of confidentiality such as these go to the heart of the relationship between lawyer and client, and they bear importantly upon the lawyer's role in the administration of justice. The decision in this case will significantly affect the ability of lawyers to provide responsible, effective legal representation and to give the informed guidance necessary to ensure compliance with the law. It therefore is of manifest importance to the organized bar, and to the legal profession generally, that this case be decided with the views, needs, and responsibilities of the profession in mind.

SUMMARY OF ARGUMENT

1. "(1) Where legal advice of any kind is sought (2) from a professional legal adviser as such, [the attorney-client privilege covers] (3) the communications relating to that purpose, (4) made in confidence (5) by the client. . . ." 8 J. Wigmore, *Evidence* § 2292 at 554 (McNaughton rev. 1961). Communications made by any person in his capacity as the agent of a client are made "by the client." *Id.* § 2317 at 618. Employees at many levels within the corporate hierarchy, not just those within the corporate "control group," may be authorized to communicate with counsel as agents of the corporation. It follows that communications to counsel made by any corporate employee acting within the scope of his authority as an agent of the corporation are made "by the client." Such communications are privileged where, as here, they satisfy the other requisites of the attorney-client privilege.

The attorney-client privilege appropriately extends to communications made by any employee, no matter

what position he occupies on the corporate organization chart, who has authority (1) to seek advice of counsel, (2) to give information relevant to the rendering of advice, or (3) to receive advice. The narrower "control group" test adopted by the court of appeals is artificial and unwarranted. To deny confidentiality to communications made to counsel by employees outside the "control group" exposes to discovery communications from the employees who are most likely to possess first-hand knowledge of the relevant facts and whose communications with counsel may constitute the essential core of the attorney-client relationship. The "control group" test thus frustrates the attorney-client privilege's central purpose of facilitating and encouraging full disclosure to counsel, and as a consequence that test hinders the ability of counsel to provide effective legal assistance.

2. This Court's prior decisions make clear that evidentiary privileges may be asserted in summons enforcement proceedings. *See Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964). The rationale of the work product doctrine extends to such proceedings; indeed, effective legal assistance with respect to disputed federal tax issues would be virtually impossible if the attorney's work product were to be subject to compelled disclosure to the government upon mere demand. Moreover, since the work product doctrine creates a qualified privilege that may be overcome by a showing of necessity, recognition of that doctrine in summons enforcement proceedings will not impede the government's ability to make inquiry into relevant facts.

ARGUMENT

I. THE ATTORNEY-CLIENT PRIVILEGE COVERS THE CONFIDENTIAL COMMUNICATIONS MADE TO COUNSEL BY ANY AGENT OF THE CORPORATE CLIENT

A. Communications Made By An Employee Within The Scope Of His Authority As An Agent Of The Corporation Are Made "By The Client"

The attorney-client privilege preserves the confidentiality of communications between lawyer and client. "If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915). *See also Connecticut Mutual Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, 458 (1876). An attorney cannot render sound legal advice or provide effective assistance unless he has thorough knowledge of all relevant facts, including both the actions his client has taken and the information upon which his client has acted. These facts can best, and in many instances only, be learned directly from the client. Confidentiality facilitates, and often may be the necessary prerequisite for, the communication of such facts by the client. Consequently, this Court has long understood that "it is indispensable for the purposes of private justice," *Chirac* v. *Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826), that "the apprehension of compelled disclosure by the legal advisers . . . be removed." 8 J. Wigmore, *Evidence* § 2291 at 545 (McNaughton rev. 1961).

The basic elements of the attorney-client privilege are well understood:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Id. § 2292 at 554. *See also United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

The dispute in this case concerns only whether the communications to counsel that the government seeks to discover were made "by the client." The other requisites for application of the attorney-client privilege all have been met: legal advice was sought from professional legal advisers, Pet. App. B, pp. 12a-13a; the communications in question related to the purpose for which advice had been sought, *id.* at 13a; the communications were made and received in confidence, *id* at 14a; and the privilege has not been waived, Pet. App. A, p. 7a & n. 12.

The question whether the communications were made "by the client" arises in this case because the client is a corporation [1] and the communications, of necessity, were made not by the corporation but by the corpora-

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[1] It is, of course, well-established that the attorney-client privilege may be asserted on behalf of corporate clients. *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963). *See also, e.g.*, United States v. Louisville & Nashville R.R., 236 U.S. at 336.

tion's employees. The court of appeals distinguished among employees on the basis of their respective positions in the corporate hierarchy and held that, as a matter of law, communications from some corporate employees, but not from others, are made "by the client." We submit that a communication is made by a corporate client whenever it is made by an employee acting within the scope of his authority as an agent of the corporation, without regard to his position in the corporate hierarchy.[2]

This rule accords with both common sense and the historic scope of the attorney-client privilege. "As

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[2] The rule proposed here is similar to the "subject matter" test articulated in Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided vote*, 400 U.S. 348 (1971). In that case, the court held that "an employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." 423 F.2d at 491-92. But the requirements of the "subject matter" test that the communication be made at the direction of superiors and relate to the performance by the employee of the duties of his employment, although presumably imposed merely to ensure that the communication is made by the employee in his capacity as an agent, appear unduly restrictive. The attorney-client privilege should be available when an employee communicates with counsel, knowing that it is appropriate and within the scope of his employment to do so, whether or not the communication is made at the specific direction of a supervisor. Nor should the privilege be restricted solely to communications relating to the performance by the employee of his particular job responsibilities; the employee should be able, for example, to make confidential communications respecting the performance by other employees of their job responsibilities. *Cf.* Note, *The Corporate Attorney-Client Privilege in the Federal Courts*, 22 Cath. Law. 138, 149-50 n. 45 (1976).

clients, corporations can communicate to attorneys only through agents." Pet. App. A, p. 4a. And it has long been recognized that the attorney-client privilege covers communications made on behalf of a client by any agent of the client:

> The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege.
>
> This of course includes communications . . . *originating with the client's agent* and made to the attorney.

8 J. Wigmore, *Evidence* § 2317 at 618 (emphasis in original).

Traditional agency doctrine provides no basis for distinguishing, for this purpose, between communications made by a corporation's senior management and those made by its lower-level employees. To the contrary, the knowledge acquired by any employee during the course of his employment is imputed to the corporation. *See Franklin Supply Co.* v. *Tolman,* 454 F.2d 1059, 1070 (9th Cir. 1972); *Bailey* v. *Gulf Ins. Co.,* 389 F.2d 889, 891 (10th Cir. 1968). An admission made by an employee concerning a matter within the scope of his employment may be offered in evidence against the corporation. *See* Fed. R. Evid. 801(d)(2)(D). And the corporation may be held liable for the conduct of any employee acting within the scope of his authority. *See United States* v. *American Radiator & Standard Sanitary Corp.,* 433 F.2d 174, 204-205 (3d Cir. 1970), *cert. denied,* 401 U.S. 948 (1971); *cf. Stand-*

ard Oil Co. of Texas v. *United States*, 307 F.2d 120, 127 (5th Cir. 1962). Elementary fairness requires that the corporation's legal advisers must be permitted to receive confidential communications from the same employees concerning the facts upon which corporate liability may be predicated.

Application of the rule proposed here ordinarily will present no difficulty. It may be expected that communications to counsel only rarely will be made by employees acting outside the scope of their authority as agents of the corporation.[3] From time to time cases may arise that present difficulty in determining whether a particular communication to counsel was made by an employee within the scope of his authority as an agent of the corporation. *Cf. Hickman* v. *Taylor*, 329 U.S. 495 (1947).[4] But this is not such a case. Virtually by definition, the communications at issue were made by employees within the scope of their authority as agents

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[3] Communications to in-house counsel on matters relating to the legal affairs of the corporation would appear invariably to fall within the scope of an employee's authority. And once outside counsel has been retained with respect to a matter, any employee would appear to have express or implied authority to make relevant communications to counsel (unless a corporate policy or rule prohibits or restricts such communications).

[4] In *Hickman*, the Court concluded that the testimony of certain employee-witnesses was not protected by the attorney-client privilege. 329 U.S. at 508. But the Court neither explicitly recognized that the witnesses in fact were employees nor treated them as such. The Court's opinion indicates, moreover, that the employer had asserted only the work product doctrine and not the attorney-client privilege. 329 U.S. at 499. In any event, the opinion suggests no reason why counsel should be deprived of the ability to interview in confidence those employees of his corporate client who in the course of their employment have witnessed events that form or may form the basis for claims against the corporation.

of the corporate client.[5] The communications were made at the request of the corporation's general counsel (who also was vice-president and secretary of the corporation), Pet. App. B, p. 12a, and they related to corporate activities for which the employees were responsible or that had come to the employees' attention in the course of, and by virtue of, their employment, *id.* at 12a-13a. The communications were made with the specific objective, moreover, of enabling the general counsel and outside counsel "to determine the nature and extent of the questionable payments [made to foreign officials by the corporation or its subsidiaries] and to be in a position to give legal advice to the Company with respect to the payments." *Id.* at 13a. It follows that these communications were made "by the client" and therefore are privileged.

The court of appeals below resisted this conclusion out of concern that preserving the confidentiality of communications made by lower-level employees would result in a "burden on discovery" and establish a "broad 'zone of silence.' " Pet. App. A, pp. 6a-7a.[6] But the denial of confidentiality to communications between counsel and employees having possession of relevant facts cannot be justified on this ground. The attorney-client privilege appropriately fosters and protects the relationship between lawyer and client, but it does not

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[5] Certain communications were made by former employees. Pet. App. B, p. 13a. It is unclear, however, whether petitioners are claiming the attorney-client privilege with respect to such communications, *see* Pet. App. A, p. 3a, and we do not address those communications here.

[6] The court also was concerned that such confidentiality would "encourage[ ] senior managers purposely to ignore important information they have good business reasons to know and use." Pet. App. A, p. 5a. This purely speculative observation, however, has no apparent factual basis.

bar discovery of the facts. No zone of silence is created by the privilege; it shields communications to counsel but not the underlying knowledge of the corporate client and its employees. All conventional avenues of discovery remain open, including questioning of employees who have personal knowledge of the facts. *See, e.g.,* Note, *The Attorney and His Client's Privileges,* 74 Yale L.J. 539, 546-47 (1965). "[T]he original source of information—the client himself [or its employees] —may always be questioned as to matters within his [or their] own knowledge . . . ." Simon, *The Attorney-Client Privilege as Applied to Corporations,* 65 Yale L.J. 953, 955 (1965). "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." *Hickman* v. *Taylor,* 329 U.S. at 516 (Jackson, J., concurring).

B. The "Control Group" Test Adopted By The Court Of Appeals Has No Inherent Logic, And It Is Contrary To The Basic Purpose Of The Attorney-Client Privilege

The court of appeals below restricted the attorney-client privilege to "only those communications made by the so-called 'control group' of the corporation, namely, those officers, usually top management, who play a substantial role in deciding the corporation's response to the legal advice given." Pet. App. A, p. 5a. This "control group" test, which arbitrarily excludes all communications made to counsel by the vast majority of a corporation's employees, has no inherent logic; it is simply an artificial means of narrowing the scope of the attorney-client privilege.

At bottom, the "control group" test reflects a failure to recognize and take into account the separate functions of (1) seeking advice, (2) giving information relevant to the rendering of advice, (3) receiving ad-

vice, and (4) acting upon advice. The "control group" test concentrates on the latter function, that of acting upon advice. It treats only those employees who exercise that function as agents of the corporation for purposes of the attorney-client privilege. But the function of acting upon advice is probably the least likely to involve significant confidential communications to counsel. Determination of the proper scope of the attorney-client privilege requires consideration of the functions of seeking advice, giving information, and receiving advice, all of which are more likely to entail confidential communications.

Employees who are authorized to seek legal advice on behalf of the corporation (and who ordinarily will also be authorized to receive advice from counsel) may or may not ultimately be members of the "control group." For example, in a large corporation an assistant general counsel or middle-level manager may have authority to retain, consult with, and receive advice from outside counsel; yet, beyond evaluating and transmitting to senior management the advice thereby received, he may not "play a substantial role in deciding the corporation's response to the legal advice given." But whether or not the employees authorized to seek and receive advice are members of the "control group," their communications to counsel, and counsel's communications to them, as a practical matter constitute the very core of the attorney-client relationship. Those communications must fall within the scope of the attorney-client privilege if the privilege is to preserve the confidentiality of the relationship between a lawyer and his corporate client.

The attorney-client privilege also must cover communications by all employees having express or implied

authority to give information to counsel relevant to the legal problems with respect to which advice has been sought. To the extent that the "control group" test denies confidentiality to such communications, that test runs contrary to the basic purpose of the attorney-client privilege, *i.e.*, "to encourage clients to make full disclosure to their attorneys." *Fisher* v. *United States,* 425 U.S. 391, 403 (1976). "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel* v. *United States,* 100 S. Ct. 906, 913 (1980). Full disclosure to counsel of all the facts relating to a corporate client's legal problems necessarily entails candid communications between counsel and corporate employees at all levels who by virtue of their employment possess knowledge of such facts.

The rationale of the attorney-client privilege applies without regard to the status within the corporate hierarchy of the employee who communicates confidential information to counsel:

> The main consideration is whether the particular representative of the client, to whom or from whom the communication is made, is involved in rendering information necessary to the decision-making process concerning a problem on which legal advice is sought. One can envision that in some situations, the attorney has to go far down in the ranks; in other instances, the attorney can obtain the necessary information close to the top.

Duplan Corp. v. *Deering Milliken, Inc.,* 397 F. Supp. 1146, 1165 (D.S.C. 1974). The objective of full dis-

closure to counsel can be realized, therefore, only if the attorney-client privilege extends to all employees of the corporate client who possess relevant information.

The narrow compass given to the attorney-client privilege by the court of appeals frustrates its central purpose of encouraging full disclosure to counsel. The "control group" test directly inhibits the very communications that counsel would find to be of greatest assistance. "In practice, [the "control group" test] results in protecting only communications of top level executives which fails to take into account the realities of corporate life." *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 608 (8th Cir. 1978) (*en banc*). A corporation's senior executives rarely will be in the best position to inform counsel concerning specific factual details on which legal issues may turn. Firsthand knowledge of the relevant facts usually is possessed by middle-level executives or operating personnel. These are the employees from whom counsel will need to acquire the information upon which advice will be based. Yet the "control group" test exposes the communications made by such employees to discovery and therefore may discourage the corporation from asking those employees to discuss the facts with counsel. In contrast, recognition that the privilege may appropriately cover the communications made by any employee within the scope of his authority as an agent of the corporation "encourages the free flow of information to the corporation's counsel in those situations where it is most needed." *Id.* at 609.

The "control group" test operates indirectly as well as directly to inhibit disclosure of relevant facts to

counsel. "From the lawyer's viewpoint, the underlying policy of assuring a client that his communications will remain confidential will be served only if the lawyer is able to predict, with reasonable reliability, that a particular communication will be held by a court to be privileged." Note, *The Attorney-Client Privilege in the Corporate Setting: A Suggested Approach,* 69 Mich. L. Rev. 360, 375 (1970). "Unless the attorney-client privilege is reasonably predictable at the time of attachment, it fails to serve its intended purpose." Weissenberger, *Toward Precision in the Application of the Attorney-Client Privilege for Corporations,* 65 Iowa L. Rev. 899, 918 (1980). The "control group" test does not satisfy the need for predictability. Under that test, each time an attorney is asked to make or receive communications to or from an employee of a corporate client, he must first inquire into the position, status, and responsibility of the employee in order to determine whether the employee is within the requisite "control group." The answer may not always be clear; the employee may play some role in deciding the corporation's response to legal advice but nevertheless be outside a subsequently determined, judicially defined "control group."[7] Position and title apparently afford little guidance and indeed may affirmatively mislead. *See, e.g., Congoleum Industries, Inc.* v. *GAF Corp.,* 49 F.R.D. 82, 84-86 (E.D.Pa. 1969), *aff'd,* 478 F.2d

[7] The attorney thus is presented with a practical difficulty at the outset. He may be forced to make an initial investigation into a matter having little or nothing to do with the legal issue with respect to which his advice is sought. He may, in effect, be required to give two layers of advice—one as to whether the ensuing communications will be privileged and another on the merits of the legal problem at hand. This can and almost certainly often will occur in situations requiring immediate legal advice on the merits.

1398 (3d Cir. 1973) (holding that corporate vice presidents in charge of production and operations were outside the "control group"). In particular circumstances, uncertainty over the membership of the "control group" could discourage even communications that otherwise might later have been recognized to be privileged.

C. The "Control Group" Test Discourages Corporate Self-Inquiry And Hinders The Lawyer's Ability To Represent His Client

The full disclosure promoted by the attorney-client privilege serves the important societal goal of "encourag[ing] adherence to the law." Miller, *The Challenges to the Attorney-Client Privilege*, 49 Va. L. Rev. 262, 270 (1963). This is especially true with regard to corporate clients. If information may be imparted to counsel in confidence, counsel is better able to investigate allegations of wrong-doing within the corporation, determine the legal implications of past actions, and advise on how to avoid future violations. *See, e.g., Duplan Corp.* v. *Deering Milliken, Inc.*, 397 F. Supp. at 1164. The process of corporate self-inquiry is demonstrated by the facts of this case. The communications now sought to be discovered were made to counsel in the course of an investigation that had been undertaken in large part to enable counsel to render advice regarding domestic and foreign laws and regulations covering, *inter alia*, securities, tax, and currency matters. *See* Pet. at 12. An investigation of this kind forms the basis for informed counseling and the rendering of the accurate legal guidance necessary to ensure compliance with the law. But such investigations might not be undertaken at all if the protection of the attorney-client privilege were removed. The "control group"

test, therefore, could seriously undermine the vitality of the socially beneficial practice of corporate self-inquiry.

The "control group" test, moreover, confronts counsel with a painful and unfair dilemma: he either must give advice and provide representation on the basis of inadequate knowledge of the facts, or he must obtain such knowledge at the risk of becoming a discovery tool for opposing parties. The dangers of proceeding without a full understanding of the facts are manifest. The lawyer has an obligation to inquire fully into the corporate actions and other facts that bear upon the advice he has been requested to give. Yet, if the "control group" test applied, the lawyer would need to advise the "control group" (assuming that it can be identified) of the hazards of making inquiries that would fall outside the protection of the attorney-client privilege. As a consequence, he might be constrained to give advice without the benefit of full and candid responses to such inquiries. Such a procedure obviously is undesirable. It does not advance the interests either of the corporation or of society at large for the corporation to be forced to play blindman's bluff with the law.

Furthermore, under the "control group" test the consequences for the lawyer who aggressively presses his inquiries into the facts can be embarrassing in the extreme. His reward for diligence may be that he later is required to disclose to opposing parties communications that may be used in a manner prejudicial to his client. The lawyer may even be called to testify against his client. A practice of that sort would be seriously "demoralizing to the Bar . . . ." *Hickman* v. *Taylor,* 329 U.S. at 516 (Jackson, J., concurring).

There also is an element of unfairness to middle management and operating personnel in the "control group" test. An attorney's investigation may result in communications by employees that reveal possible civil or criminal violations that they may have committed in the course of their employment and for which they may be personally liable. *See, e.g., United States* v. *Wise*, 370 U.S. 405 (1962). Under the "control group" test, the corporation or its counsel could be compelled to disclose all communications made by officers and employees other than senior executives: only communications made by members of the "control group" would be insulated from compelled disclosure. Thus the test unfairly puts different employees on different legal footings with respect to the confidentiality of their admissions to corporate counsel. The knowledge that the government could compel the corporation or its counsel to disclose their potentially incriminating communications almost certainly would dissuade lower-level employees who have information of questionable activities from revealing such information to counsel. As a consequence, the "control group" test could directly frustrate the corporation's efforts to discover the facts and acquire the information that it needs in order to put an end to any unlawful activities and place itself in full compliance with the law.

II. THE WORK PRODUCT DOCTRINE IS AVAILABLE IN ADMINISTRATIVE SUMMONS ENFORCEMENT PROCEEDINGS

The court of appeals erred in holding that "[t]he work product doctrine . . . is not applicable to administrative summonses issued under 26 U.S.C. § 7602." Pet. App. A, p. 7a n. 13. This Court already has indi-

cated that "the witness may challenge the summons on any appropriate ground." *Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964). More recently, the Court has reiterated that the testimonial obligation imposed by a tax summons remains "subject to the traditional privileges and limitations." *United States* v. *Euge,* 100 S. Ct. 874, 879 (1980). In short, "the work product doctrine *does* have applicability to a proceeding for the enforcement of an Internal Revenue summons." *United States* v. *Brown,* 478 F.2d 1038, 1041 (7th Cir. 1973) (emphasis added).

The court of appeals may have believed that the work product doctrine applies only in actions governed by the Federal Rules of Civil Procedure. *See* Pet. App. A, p. 7a n. 13. If so, that belief clearly was mistaken. The work product doctrine also is available, for example, in criminal cases and grand jury proceedings. *See, e.g., United States* v. *Nobles,* 422 U.S. 225, 238 (1975); *In re Grand Jury Subpoena,* 599 F.2d 504, 509-10 (2d Cir. 1979); *In re Grand Jury Proceedings,* 473 F.2d 840, 842 (8th Cir. 1973).

The rationale of the work product doctrine equally extends to administrative summons enforcement proceedings. This Court's thorough explication of that rationale bears repeating here:

> *Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.*
>
> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work

> with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. *Taylor,* 329 U.S. at 510-11 (emphasis added). The considerations and concerns thus identified by the Court remain present, whether the discovery sought is in a civil action or, as here, in an administrative summons enforcement proceeding.

Indeed, it is difficult to see how a lawyer could be expected to provide adequate representation with respect to disputed federal tax issues in the absence of the confidentiality traditionally afforded by the work product doctrine. Ordinarily, whether the issues are civil or criminal in nature, the lawyer would interview the client (or, in the case of a corporate client, its

employees) and other witnesses; take notes recording statements, observations, impressions, thoughts, and conclusions; write memoranda evaluating the factual and legal strengths and weaknesses of the client's case, assessing potential liability, and, perhaps, considering the advisability of settlement discussions; and may also record his thought processes and the results of his investigations in other ways. Little if any of this necessary spadework could be safely done if the attorney's work product were to be made subject to compelled disclosure upon the mere request of the Internal Revenue Service. Lawyers and their tax clients cannot fairly, and should not, be forced to choose between preparing for trial in the dark and doing so in a fishbowl.

Assertion of the work product doctrine in summons enforcement proceedings does not foreclose or significantly curtail the government's ability to conduct a searching inquiry into the pertinent facts. The Internal Revenue Service has ample authority to secure information from a corporation, its employees, and others who may be in possession of business records or actual knowledge of the facts. Moreover, the work product doctrine itself establishes only a qualified privilege that may be overcome by a showing of necessity. *See Hickman* v. *Taylor,* 329 U.S. at 511-12; Fed. R. Civ. P. 26(b)(3). Thus, the government's legitimate interest in knowing the facts and reviewing the evidence can be given appropriate recognition within the traditional confines of the work product doctrine. *See United States* v. *Brown,* 478 F.2d at 1041. That interest does not require or justify wholesale rejection of the work

product doctrine in administrative summons enforcement proceedings.[8]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[8] In this case, the district court adopted the magistrate's determination that the government had made a sufficient showing of necessity to overcome the privilege. Pet. App. C, pp. 39a-40a; Pet. App. B, pp. 28a-30a. If this Court concludes that the work product doctrine is available in administrative summons enforcement proceedings, the Court should remand the case to the court of appeals for consideration of petitioners' appeal from the district court's decision on the issue of necessity.